

## Recent Advances Related To Rape Laws

*Dr. Mukesh Yadav*

*Assoc. Professor, Deptt. of Forensic Medicine*

*M.M. Institute of Medical Sciences & Research, Mullana, Ambala-133203*

### **Address for Communication:**

*B-19, M.M. Institute of Medical Sciences & Research,  
Mullana, Ambala –133203 (Haryana)*

*Telephone No. 01731-309756, 93151-15784,*

*Email: [drmukeshy14@rediffmail.com](mailto:drmukeshy14@rediffmail.com)*

*[yadav\\_drmukesh@yahoo.co.in](mailto:yadav_drmukesh@yahoo.co.in)*

### **ABSTRACT**

Uncontrolled increase in rape incidences all over India especially in Delhi, ironically called a '**Rape Capital**'. The number of alleged rapes reported in 2004 crossed the 500 mark, for the first time in the Capital's history<sup>1</sup> spurt in incidences of rape, especially against foreigners attracted attention of media both at national and international levels. A 36 years old Swiss Diplomat was abducted and raped in her car on October 14, 2003. On March 15, 2004 a businessman at Deer Park in Safdarjung Enclave allegedly raped a 20 years old Fiji student. On March 17, 2004 a 59 years old Australian tourist was allegedly sexually assaulted and murdered by a taxi driver near IGI Airport, barely a couple of hours after she landed from Brisbane.<sup>2</sup>

This paper deals with recent advances made in Indian rape laws in 2005, a brief review of amendments done in 1983 and role of DNA profile in rape cases, their impact in controlling the most heinous crime against humanity i.e. 'Rape'.

**Key Words:** Crime, Heinous, Human Rights, Humanity, Rape.

### **INTRODUCTION:**

Rape is a crime, which has a devastating effect on the survivors; it has been described as a "**beginning of a nightmare**". The after shocks include depression, fear, guilt-complex, suicidal-action, diminished sexual interest. etc., "one becomes afraid of.....writes a victim, "half the human race". Referring to the pitiable condition of women in society **Mr. Justice S. Ahmad** observed that "unfortunately, a woman in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have therefore, been victims of tyranny at the hands of men with whom they, unfortunately, under the Constitution "**enjoy, equal status**". "Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honorable and peaceful life".<sup>35</sup>

Rape is a **crime against basic human rights** and is also violative of the **victim's most cherished of the fundamental rights**, normally, the **right to life** contained in **Article 21**.<sup>33</sup>

Legal meaning of rape u/s **375 IPC** is simple and easy to understand.<sup>16</sup> In the **UK**<sup>3</sup> **rape is a capital offence** punishable with **imprisonment for life**. **Section 376 IPC** provides imprisonment for a term that may extend up to 10 years as punishment for rape. In most countries of the world rape is considered as a **serious crime**, though always **not for the same reason**, in many **African Tribes**, rape is **heavily fined** because it is considered as a **violation of property rights**, the woman belonging either to **a father** or a **husband**.<sup>22</sup>

### **Incidence and prevalence:**

**South Africa** has the highest per capita rate of reported rapes in the world: 119 per 100000 people, according to the UN. That compares with 30 per 100000 in the **US**. Analysts and women's advocacy groups argue South Africa's total, including unreported rapes could be five to nine times higher.<sup>4</sup>

Police statistics show more than 50000 rapes are reported every year.<sup>5</sup> In 1987 and 1991 number of cases reported were 7767 and 9793 respectively. About 26% (11112) increase in number in the year 1992 - (NCRB). There is one rape in every 54 minutes.<sup>6</sup>

### **Beginning of Changes in Rape Laws:**

The fact that in every case of rape trial, consent beyond all reasonable doubts is difficult to prove was highlighted in the **landmark Mathura Trial**<sup>7</sup> that was instrumental in triggering the campaign for change in rape laws. The **Law Commission Recommended**<sup>8</sup> certain amendments were introduced and Sections 376A to 376D were introduced in the IPC.<sup>16</sup> These changes include protection of victim during investigation, change in the definition to remove the element of consent, addition of custodial rape as a crime and increase in the punishment of custodial, gang rape and rape of a pregnant and minor woman.

Amendments in Indian Evidence Act (IEA) <sup>10</sup>:

Presumption as to absence of consent: Sec.114-A, IEA<sup>9, 10</sup>

In a prosecution for rape u/s **376(2)** Clauses (a), (b), (c), (d), (e), (g) IPC where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. This Section shifted the burden of proving consent, to the accused.<sup>10</sup>

The M.P. High Court accordingly held that by virtue of this section the burden of proving consent became shifted to the accused. The section came into play on proof by the prosecution that sexual intercourse had, in fact, taken place and on the victim girl saying before the court that there was no consent on her part.<sup>11</sup> court cited the decision of the SC<sup>12</sup> which was, of course, not on the section and preceded its enactment, to the effect that the absence of marks of injury on the accused is not fatal in each case, nor does the absence of such physical injuries on the prosecutrix warrants the presumption of the consent on her part.

It has been held that the presumption under Section 114 A is attracted only to cases that fall under Section 376 (2) IPC, and not to cases that fall under Section 376 (1) IPC.<sup>13</sup> Where in a case of gang rape there was unexplained delay of nine days in lodging the complaint, the victim was desirous to marry one of the accused, the victim unwillingly made the report under the pressure of her parents and the unexhibited report of the chemical examiner contradicted story of sexual intercourse, it was held that presumption under Section 114-A, IEA was not attracted.<sup>14</sup> It has been held that the absence of injuries on the accused or the prosecutrix, the victim of rape, is not *per se* sufficient to indicate her consent.<sup>15</sup>

### **Evidence as to Immoral Character of Rape Victim:**

Another problem of the rape victims at the time of trial deserves notice. Section 155(4)<sup>10</sup> permits the cross-examiner to ask the victim of rape questions about her past character. These questions can be very embarrassing and place the victim under severe emotional strain. The questions can cover not only her immoral association with the accused in the past, but also her alleged immoral character. It is now accepted that there are certain rights, which are inevitable for the dignified existence of a human being. That the dignity of a human being should be respected seems to be the basic to all such rights. These provisions violate the dignity of the women victim of rape and violate 'her right to privacy'. Only amending the law can check this. The Law Commission of India in more than one of its reports has recommended an amendment of this provision.

### **Identity of Victim should not be revealed <sup>9, 16</sup>**

Section 228-A has been introduced to prevent social victimization or ostracism of the victim of a sexual offence. Thus, not only protect the honour of sexually victimized women but also make it possible for them to depose in court without any fear of societal ostracism.

### **When identity can be revealed?**

Any printing or publication which may make known identity of the victim is allowed only if, such printing or publication is authorized in writing by:

- The officer-in-charge of the police station or the police officer making the investigation acting in good faith for the purpose of investigation or
- The victim or
- Next of kin (where the victim is dead or minor or of unsound mind can give such authorization to the Chairman or the

- Secretary of any Social Welfare Institution or Organization recognized by the Central or State Government.
- Where any proceeding is pending or under trial before a court, with the previous permission of such court.

### What is the punishment?

Whoever, prints or publishes any matter disclosing the identity of the victim, in a case before a court without the previous permission of such court shall be punished with imprisonment up to two years and shall also be liable to fine.<sup>9, 16</sup>

### What is not an offence?

The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

### AMENDMENTS IN CRIMINAL PROCEDURE CODE:

#### Trial in Camera<sup>9, 17</sup>: Sec. 327 (1), (2)

The inquiry into and trial of rape or an offence under Section 376, 376A, 376B, 376C and 376D IPC shall be conducted *in camera*:

Presiding judge may,

- If he thinks fit, or
- On an application made by either of the parties,
- Allow any particular person to have access to, or be or remain in, the room or building used by the Court.
- Printing or publishing any matter in relation to any such proceedings is allowed only with the previous permission of the Court.

The Court has to exercise its discretion in proceedings in such matters as ought to be conducted in privacy. The power of the Court to hold certain trials in cameras is inevitably associated with the administration of justice itself similar provisions are also found in other places.<sup>18, 19, 20, 21</sup> It was also held in the same case<sup>21</sup> that the trial of rape case *in camera* should be the rule and an open trial an exception.

### EXAMINATION OF ACCUSED AND VICTIM:

In addition to physical examination it shall also include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including **DNA profiling** and **such other tests** which the **RMP** thinks necessary in a particular case.<sup>31</sup>

### WHO CAN EXAMINE?

- Any medical practitioner who possess any medical qualification as defined in Section 2(h) of the Indian Medical Council Act, 1956 and whose name has been entered in a State Medical Register i.e. any doctor with minimum M.B.B.S. qualification.<sup>31</sup>
- Employed in a hospital run by:
  - The Government or
  - A local authority and in the absence of any such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed,
- By any other RMP i.e. any private practitioner fulfilling all above criteria.<sup>31</sup>

Medical examination of the victim of rape<sup>31</sup> (164-A):

- It is proposed to get the person of the women, examined by a RMP<sup>31</sup> within twenty-four hours from the time of receiving the information by the police.
- The consent of the woman or of any person competent to give such consent on her behalf.
- General mental condition of the woman; and

Particulars to be recorded for Examination of Accused/Victim: <sup>31</sup>

- Exact time of commencement and completion of the examination shall also be noted in the report.
- Name and address of the accused/victim and of the person by whom he was brought,
- Age,
- Marks of injury,
- Description of material taken from the person of the accused for DNA profiling,
- Other material particulars in reasonable detail.

Examination of Accused by Medical Practitioner at the Request of Police Officer (Sec. 53-A): <sup>17, 29, 30</sup>

#### **PREREQUISITES:**

- A person must be arrested on a charge of committing an offence u/s 375, 376 IPC.
- Reasonable grounds for believing that an offence has been committed.
- A request from a police officer not below the rank of Sub-inspector for the examination of accused in writing.
- Reasonable grounds for believing that an examination will afford evidence as to the commission of such offence.
- Examination is allowed only to the extent as is reasonably necessary in order to ascertain the facts, which may afford such evidence of rape.
- Law Authorize a RMP<sup>31</sup> to use force as is reasonably necessary for that purpose, even without consent and take help of any person to take assistance or direct under his supervision acting in good faith in his aid and under his direction.

No unnecessary delay and reasons for Opinion:

- The RMP shall examine such person and prepare a report of his examination and without delay, forward the report of the IO, who shall forward it to the Magistrate. The report shall state precisely the reasons for each conclusion arrived at.<sup>31</sup>

Inquest by Judicial Magistrate into cause of death of alleged custodial rape & unnatural death: <sup>31</sup> (Section 174 (1A), (b))

#### **INGREDIENTS:**

- Rape is alleged to have been committed on any women in the custody of the police or
- In any other custody authorized by the Magistrate.

#### **THE JUDICIAL MAGISTRATE SHALL:**

- Record the evidence taken by him in circumstances of the case.
- Wherever, considers it expedient to make an examination of the dead body of any person.
- Whenever practicable, inform the relative of the deceased whose names and addresses are known, allow them to remain present at the inquiry (children, brothers, sisters and spouse).
- Within twenty-four hours of the death of a person,
- forward the body with a view to its being examined
- to the nearest Civil Surgeon or
- other qualified medical man appointed in this behalf by the State Government,
- If not possible to do so, reasons to be recorded in writing.

#### **FACTORS FOR ACQUITTAL:**

In India, though about 80 percent of the rape cases are charge sheeted by the police, a large number of these cases ultimately end in acquittal because various factors like delayed reporting, unfavorable medical opinion, witnesses turning hostile etc. Of the total number of rape cases in which trials were completed, 34.2 percent ended in conviction in 1991 and 33 percent in 1992.<sup>22</sup>

Role of Medical Opinion:

One important factor behind failure of a large number of cases in courts of law is the negative opinion given by the medical officers who examine the rape victims. Medical evidence is a crucial piece of information to establish the case of rape. The IO has to rely upon the examination report given by the doctor.

Role of lady doctor:

It is seen that lady doctors in government hospitals hesitate to give frank medical opinion in rape cases for fear of appearing as a

prosecution witness and then being subjected to "**embarrassing cross-examination in the courts of law**". In Sundergarh District of Orissa a case ended in acquittal because the information given by the lady doctor was ambivalent and also because of gaining over of some witnesses, who impeached the character of the prosecutrix.<sup>22</sup>

The Law Commission in its Report (1980) also pointed out "the report of medical examination is often cursory or is not sent in time" and recommended some additions to the provisions of rape laws, the most important being that the "report shall state precisely the reasons for each conclusion arrived at".

Supreme Court's recent views on:

**Consent and Submission:**

In a ruling to plug a loophole in rape cases, the SC has held that a person accused of raping a mentally challenged woman cannot escape the punishment on the plea that he had the consent of the victim for sexual act. A mentally challenged girl cannot legally give consent to be a party to a physical act as she does not understand the consequences that follow. The bench made a clear distinction between consent and submission. It said consent has to be a conscious and voluntary act. "Every consent involves submission but the converse does not follow, and mere act of submission does not involve consent". It said consent could be constituted when a woman has the knowledge of the significance and the moral effect of the act.<sup>25</sup>

**Consensual Intercourse:**

The trial court relied on the evidence produced by the police and convicted him but the high court acquitted him saying it was "consensual intercourse" and the girl was not a minor. There were categorical statements of the victim that she was raped and threatened with dire consequences if she told others about it. "Looked at from any angle, the judgment of the high court is indefensible and the same is accordingly set aside".<sup>25</sup>

**Court's Duty towards Victim:**

The Apex Court<sup>26</sup> had asked the judiciary to be conscious of the fact the rapist is on trial and not the sexually abused helpless victim, in a case, in which a rapist was acquitted by Himanchal Pradesh HC on the ground that the victim had already lost her virginity when raped.

The SC Bench asked courts to "to display a greater sense of responsibility" and be more "sensitive" while dealing with charges of sexual assault on women, particularly of a tender age and children. A woman is not "a vulnerable objects or prey for being sexually assaulted by anyone and everyone. A victim of rape stands on a higher pedestal than other victims as she is injured both psychologically and emotionally".<sup>26</sup>

**Awarding less than Minimum Punishment:**

The SC has urged courts to refrain from "indiscriminately" using the discretionary power vested in them to award a lesser sentence for the crime. The power under provisions of Sections 376 (1) and 376 (2) is given to courts "to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court."<sup>27</sup>

**Court's Duty towards Society:**

"The crime...is a particularly heinous crime against society, a crime against human dignity, one that reduces a man to an animal. Long-pendency of criminal trial and offer to marry the victim are not relevant reasons. Nor is the offender's age by itself an adequate reason, similarly rural background as in present case. Court cannot forget their duty to society and the victim in the guise of applying the reformation theory of punishment".<sup>27</sup>

**NON-CROSS EXAMINATION OF DOCTOR:**

The S.C. has ruled that "Once the statement of prosecutrix (rape victim) inspires confidence and is accepted by the courts as such, conviction can be based only on the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statements of the victim and other prosecution witnesses inspire confidence".<sup>28</sup>

Scarcity of doctors:

"We wish to put on record our disapproval of the refusal by some government hospital doctors, particularly in rural areas where hospitals are few and far between, to conduct any medical examination of a rape victim unless a case of rape is referred to them by the police. Such refusal to conduct the medical examination necessarily results in delay in the ultimate examination of the victim, by which time the evidence of the rape may be lost"- a three judge Bench of SC headed by CJI, Mr. A.S. Anand.<sup>36</sup>

Compensation to Rape victims:

In this scenario, the SC judgment<sup>34</sup> suggesting the formulation of a scheme for awarding compensation to rape victims at the time of convicting a person found guilty of rape is appreciable. The court suggested the setting up of a Criminal Injuries Compensation Board under Article 38(1)<sup>33</sup>. In a landmark judgment<sup>35</sup> the SC, awarded an interim compensation of Rs.1000 per month to, the victim of rape until her charges of rape are decided by the trial Court.

Rate of Disposal of Rape Cases:

From a sample study of 100 cases of rape, kidnapping and abduction, it was found that only in 34 percent cases, trials were completed in six months, in 48 percent cases within 6 to 12 months, and in 17 percent cases it took more than a year. The rate of disposal of rape cases is about 18 percent-a study by the Bureau of Police Research and Development.<sup>22</sup>

Need for 'Fast Track' Courts':

Based on the philosophy of "justice delayed means justice denied" and 'Right to Speedy Trial' provided under Article 21.<sup>33</sup>

A Delhi HC acting on the same lines, pronounced judgment on January 6, 2005 in the infamous MAMC, medical student's 'gang rape case'. The verdict came within two years.<sup>37</sup>

Similarly, breaking all the previous records, in one of the speediest trials for a rape case, the 'fast track court' in Jodhpur, decided the case within 16 days. Taking *suo motu* cognizance of the case, the Rajasthan HC directed the state government to ensure speedy investigation within a month. The court issued a notice to the DGP to ensure that the forensic report be made available to the trial court by May 16, 2005.<sup>23, 24</sup>

## SUMMARY & CONCLUSIONS

Law remains but the number of victims (including minor) continues to increase destroying the very soul of the helpless women. The concept of marital rape does not exist in India. Contrary to the popular belief rape is almost never perpetrated for sexual gratification. It is an 'acts of violence that happens to be expressed through sexual means'.

The Amendment 1983<sup>9</sup> has brought about some important changes in the existing laws of rape as a response to the growing public opinion demanding more stringent anti rape laws. It amends Section 376 IPC and enhances the punishment of rape it also provides enhanced punishment of minimum of 10 years of imprisonment for police officers or staff of jail, the remand homes or other places of custody established by law. The Act further inserts a new Section 114-A IEA, by raising a presumption as to absence of consent in cases of custodial rape, rape on pregnant women and gang rape at least partially, removed the infirmity from the evidence of a victim of rape that was hitherto unjustly attached to her testimony without taking note of the fact that in India, unlike the occident a disclosure of the girls identity, rehabilitation in society for all times to come and unless her story was painfully true she would not have taken such a grave risk merely to malign the accused.R1

The Act also provides for trial *in camera*. It also inserts a new section in the IPC Sec 228(A), which makes disclosure of the identity of the victims in rape cases a punishable offence.

Similarly, Amendments, 2005<sup>31</sup> brought forth many changes in rape laws, especially related to detailed procedure of examination of victim and accused both by inserting new sections: 164-A, 174 (1A), (b), and 53-A (a) CrPC, and made it clear that in addition to physical examination, it also shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the RMP thinks necessary in a particular case. Section 174 (1A), (b), CrPC inserted to make mandatory inquiry by the Judicial Magistrate in cases of custodial rape and murder cases.

Thus, an endeavor to remove many lapses in existing rape laws like: they provide immunity to the doctor for examination when accused is not giving consent and also removed the loopholes of law for examination of accused only by a government doctor.

These changes are important in view of the shortage of government doctors and that to of lady doctors in far-flung rural areas. It may be seen as a step towards privatization of medicolegal practice in the interest of justice. Under Article 141<sup>33</sup> observations and administrators of justice should treat directions of SC as law.

Severe and certain punishment in a time bound manner, of the rapists has some deterrent value. Arrest alone may not constitute a strong societal response. Lengthy prison sentences have some behavior-altering deterrent values. Many well-known jurists and public men have advocated capital punishment for the criminals who commit rape as it is an offence worse than murder so far as its impact is concerned. Still there is need for amending the anomaly related to the age of consent, and of wife in accordance with the Marriage Act in India.<sup>20</sup>

## REFERENCES

1. '500 Rapes in 2004', Hindustan Times, December 25, 2004: 11.
2. "Swiss rape case: 20000 Quizzed, No Headway Made", The Times of India, October 15, 2004: 8.
3. The Offence Against the Person Act, 1861.
4. The Tribune, September 2, 2005.
5. The Times of India, September 2, 2005: 10.
6. A publication of the Department of Women and Child, Govt. of India.
7. TukaRam v. State of Maharashtra, AIR 1979 SC 185.
8. The 84th Report of Law Commission on Rape and Allied Offences),
9. The Criminal Law (Amendment) Act, 1983, (Act 43 of 1983), w.e.f. 25-12-1983.
10. Ratanlal & Dhirajla's, 'The Law of Evidence, Edition 19<sup>th</sup> 1997: 361. The Indian Evidence Act, (Act 1 of 1872)
11. Nawab Khan v. State, 1990 CrLJ 1179).
12. Rafiqu v. State of U.P., AIR 1981 SC 559: 1980 Cr LJ 1344,)
13. Ramcharan v. State of M.P., 1993 Cr LJ 1825 (M.P.).
14. Shatrughan v. State of M.P., 1993 Cr LJ 120 (M.P.).
15. State of U.P. v. Padam Singh, 1996 ALHC 169 (All).
16. The Indian Penal Code (45 of 1860), Sec. 375, 376, Sec. 228-A, IPC.
17. The Code of Criminal Procedure, 1973, (Act No. 2 of 1974), Sec. 327 (1), (2), 53, 54.
18. Sec. 53 of the Indian Divorce Act, 1923,
19. Sec-22 (1) of the Indian Secrets Act, 1923,
20. Sec-22 (1) of the Hindu Marriage Act, 1955,
21. Naresh Shridhar, AIR 1967 SC1.
22. Women and Human Rights (4C.2) published by the IIHR, New Delhi: 11-12) (a study by the Bureau of Police Research and Development).
23. 'Two get life term for raping German Tourist', Hindustan Times, June 1, 2005: 1,

24. 'Rajsthan Special Cell to Handle Rape Cases', The Times of India, June 3, 2005: 8)
  25. Hindustan Times, October 8, 2003: 8.
  26. 'SC convicts teacher for raping student', The Times of India, September 16, 2005: 5).
  27. 'Courts shouldn't be soft on rapists during sentencing', Hindustan Times, May 20, 2005: 9)
  28. SC Doc's testimony not essential in rape case, The Times of India, October 3, 2005: 1)
  29. Ratanlal & Dhirajla's 'The Code of Criminal Procedure, Edition 15<sup>th</sup>, 1997.
  30. See Gazette of India Extraordinary Part II, Sec. 2, dated December 10, 1970: 1315.
  31. The Criminal Law (Amendment) Act, 2005, Explanation: Section and in 53A and 54, (176 (1A) IPC), Cr PC 164 A.
  32. U.P. Act 1 of 1984, Sec. 7 (w.e.f. 1-5-1984).
  33. Indian Constitution.
  34. Delhi Domestic Working Women's Forum v. Union of India (1995) (1) SCC 14,
  35. Bodhisathwa Gautam v. Subhra Chkraborty, (1996) 1 SCC 490.
  36. The Indian Express, June 7, 2000.
  37. Hindustan Times, December 16, 2004: 7.
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